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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID A. MARQUEZ,

Defendant and Appellant.

B220833

(Los Angeles County
Super. Ct. No. GA051257)

APPEAL from an order of the Superior Court of Los Angeles County, Jacqueline H. Nguyen, Judge. Affirmed.

William D. Farber, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance on behalf of Plaintiff and Respondent.

Defendant, David Arguello Marquez, appeals from an order denying his motion for writ of error to vacate a 2003 conviction after he pled guilty to one count of second degree robbery. (Pen. Code,¹ § 211.) Defendant also admitted he personally used a firearm. (§ 12022.5, subd. (a).) In exchange for the plea, defendant received a five-year sentence.

On May 29, 2007, the United States Department of Justice, Immigration and Naturalization Service, ordered defendant to appear for removal proceedings on the basis of his 2003 conviction. It was alleged that defendant had been convicted of an aggravated felony, a crime of violence, which subjected him to deportation. Defendant was ordered detained pending a final determination by an immigration judge. On December 20, 2007, following removal proceedings, the United States Immigration Court ordered defendant deported to Nicaragua.

On August 19, 2009, defendant filed a motion to set aside his 2003 conviction. The motion alleged that both defense counsel and the trial court had failed to adequately advise defendant of the immigration consequences of the plea. Defendant styled the motion as one for an order of writ of *coram nobis* for failure to comply with section 1016.5. On November 24, 2009, the trial court treated the pleading as a motion to vacate plea under section 1016.5. The trial court denied the section 1016.5 motion because defendant was advised he would be deported and not allowed to reenter the United States and he acknowledged he understood the advisement. With respect to the ineffective

¹ All further statutory references are to the Penal Code unless otherwise indicated.

assistance of counsel claim, the trial court ruled any such issue should be raised by a habeas corpus petition; but, defendant had not demonstrated he was in state custody so that his claim is subject to review by habeas corpus petition in a California court.

We appointed counsel to represent defendant after he appealed from the order denying the section 1016.5 motion. After examination of the record, appointed appellate counsel filed an “Opening Brief” in which no issues were raised. Instead, appointed appellate counsel asked us to independently review the entire record on appeal pursuant to *People v. Wende* (1979) 25 Cal.3d 436, 441. On March 9, 2010, we advised defendant that he had 30 days within which to personally submit any contentions or arguments he wishes us to consider. No response has been received from defendant. We have examined the entire record and are satisfied that defendant’s attorney has fully complied with his responsibilities. No argument exists favorable to defendant on appeal. (*Smith v. Robbins* (2000) 528 U.S. 259, 277-284; *People v. Wende, supra*, 25 Cal.3d at p. 441.)

The petition for writ of error *coram nobis* is similar to a motion to vacate the judgment. (*People v. Shipman* (1965) 62 Cal.2d 226, 229 fn. 2; *People v. Gallardo* (2000) 77 Cal.App.4th 971, 982.) However, the standards for the two proceedings are not always the same. “A writ of coram nobis is generally used to bring factual errors or omissions to the court’s attention. [Citation.] ‘The writ will properly issue only when the petitioner can establish three elements: (1) that some fact existed which, without his fault or negligence, was not represented to the court at the trial and which could have prevented the rendition of the judgment; (2) that the new evidence does not go the merits of the issues of fact determined at trial; and (3) that he did not know nor could he have,

with due diligence, discovered the facts upon which he relies any sooner than the point at which he petitions for the writ. [Citations.]’ [Citations.]” (*People v. Ibanez* (1999) 76 Cal.App.4th 537, 544-545; see *People v. Gallardo, supra*, 77 Cal.App.4th at p. 982, fn. 5.) The writ of error coram nobis is a non-statutory common law remedy which asks the court to consider newly discovered evidence. (*People v. Kim* (2009) 45 Cal.4th 1078, 1092-1093, 1095-1096; *People v. Shipman, supra*, 62 Cal.2d at p. 230.) A motion to vacate provides a statutory remedy for the failure to comply with section 1016.5. (*People v. Villa* (2009) 45 Cal.4th 1063, 1075; *People v. Gallardo, supra*, 77 Cal.App.4th at p. 982, fn. 5.) In this case, the *coram nobis* petition raised two issues; the trial court’s failure to comply with section 1016.5 and ineffective assistance of counsel. Neither of these claims involves factual errors. Thus, the matter could properly be treated as a motion to vacate.

Before his plea was entered, defendant was advised of the immigration consequences of the plea as follows: “If you are currently not a citizen of the United States, you will be deported. If you should later apply for citizenship, permanent residency or attempt to enter the country, your application will be denied.” Defendant was asked if he understood everything that had just been explained to him. Defendant replied, “Yes.” Section 1016.5 was satisfied because, before defendant pled guilty, he was advised he would be deported if he was not a citizen and he responded that he understood the consequences of his plea. (*People v. Villa, supra*, 45 Cal.4th at p. 1076 [§1016.5 is satisfied where record shows trial court informed defendant of the potential

immigration consequences of plea] *People v. Limon* (2009) 179 Cal.App.4th 1514, 1518 [same].)

The ineffective assistance of counsel claim was not cognizable on *coram nobis*. (See *People v. Kim, supra*, 45 Cal.4th at p. 1104 [ineffective assistance of counsel claim relates more to a mistake of law rather than to one of fact making in inappropriate for *coram nobis*]; *People v. Villa, supra*, 45 Cal.4th at p. 1076 [ineffective assistance of counsel claim is not cognizable on *coram nobis*]). An ineffective assistance of counsel claim should have been raised by a habeas petition but the remedy is unavailable to defendant. This is because defendant was neither in actual nor constructive state custody but was in federal custody pending deportation. (*People v. Villa, supra*, 45 Cal.4th at pp. 1069-1075 [habeas corpus writ is unavailable to person in federal immigration custody pending deportation based on a prior California conviction for which a sentence has been completed as defendant is no longer in either actual or constructive custody in California]; see *People v. Picklesimer* (2010) 48 Cal.4th 330, 339 [defendant neither in actual nor constructive custody may not challenge sex offender registration requirement via habeas corpus petition].)

The order denying the motion to vacate is affirmed.

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TURNER, P. J.

We concur:

ARMSTRONG, J.

KRIEGLER, J.